88-1579

Supreme Court, U.S.
FILED
MAR 25
JOSEPH F. SPANIOL, JR.
CLERK

Case No._____

The Supreme Court of the United States of America

OCTOBER, 1988 TERM

JAMES W. ROSS, JR., PETITIONER

VS.

THE STATE OF SOUTH CAROLINA, RESPONDENT

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

JOHN P. FORD
17 East Calhoun Street
P.O. Box 2038
Sumter, South Carolina
Telephone: (803) 775-1263
Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the trial court's refusal to allow counsel for the Petitioner to cross-examine the State's confidential informant, whose identity was disclosed at trial, as to whether the State had a case it could make against her violated the Sixth Amendment right of confrontation of prosecuting witnesses and the Fourteenth Amendment right of due process of law.

PARTIES

The caption of the case in this Court contains the names of all parties to the case.

TABLE OF CONTENTS

		PAGE
1.	Questions Presented	i
2.	Parties	i
3.	Table of Contents	iii
4.	Table of Authorities	iv
5.	Reference to Reports	1
6.	Grounds of Jurisdiction in this Court	1
7.	Constitutional Provision Involved	1
8.	Statement of Material Facts	2
9.	Stage in Which Constitutional Questions Raised	3
10.	Argument for Allowance of Writ	4-7
11.	Appendix	A-i
	(a) Order affirming conviction	
	(b) Relevant portions of Transcript of Record	

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

Amendment VI
Amendment XIV

CASES

Alford v. United States, 282 U.S. 687 (1931)

Delaware v. Van Arsdall, 475 U.S. 673 (1986)

Com. v. Doherty, 394 Mass. 341, 476 N.E.2d 169 (1985)

McAllister v. Brown, 555 F.2d 1277 (5th Cir. 1977)

People v. King, 179 Colo. 94, 498 p.2d 1142 (1972)

Pointer v. Texas, 380 U.S. 400 (1965)-

State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986)

United States ex rel Annunziato v. Manson,
425 F.Supp. 1272 (D.Conn. 1977) aff'd 566 F.2d 410

STATUTES

28 U.S.C.A. Section 1257 (3)

REFERENCES TO REPORTS

The Petitioner's conviction was affirmed by the South Carolina Supreme Court under Rule 23 of its *Rules of Practice and Procedure*, which means that no written decision was ever reported. The fact that the conviction was affirmed was announced in the Table of Contents of the February 11, 1989, Davis Advance Sheets of South Carolina Supreme Court decisions.

GROUNDS OF JURISDICTION IN THIS COURT

The Supreme Court of South Carolina, the court of highest resort in South Carolina, affirmed the conviction of the Petitioner on February 7, 1989.

The Petitioner believes that jurisdiction is conferred upon this courts under 28 U.S.C.A. Section 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides, in pertinent part, that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . "

The Fourteenth Amendment of the United States Constitution provides, in pertinent part, that "nor shall any state deprive any person of life, liberty, or property, without due process of law . . . "

STATEMENT OF MATERIAL FACTS

On November 28, 1986, the Petitioner, while driving his truck, was stopped and arrested for possession of marijuana and for possession of cocaine with intent to distribute. The arrest was triggered by a telephone call to law enforcement from Tammy Taylor, a confidential informant who said she had been in the Petitioner's truck that day and saw cocaine. Taylor never saw any marijuana in Ross' truck; however, she had marijuana in her possession which she offered to Ross and he refused.

The case was tried in th Court of General Sessions for Sumter County, South Carolina, on August 20 - 23, 1987. Although the State had successfully blocked the disclosure of the identity of the confidential informant prior to trial, Ms. Taylor was called as a State's witness during the trial, and her involvement in the case disclosed.

On cross-examination, counsel for the Petitioner was allowed to inquire into Taylor's past drug use. Counsel also attempted to ask her whether the State had a case which it could make against her if she did not become an informant. The State's objection to this line of question was sustained.

The jury found the Petitioner guilty of possession of marijuana. The trial court sentenced the Petitioner to one (1) year imprisonment.

On appeal to the Supreme Court of South Carolina, the conviction was affirmed.

STAGE IN WHICH CONSTITUTIONAL QUESTIONS RAISED

During cross-examination of the confidential witness, counsel for Petitioner asserted that he should be allowed to question her credibility by inquiring into her motivations for becoming a confidential informant, particularly as to whether the State had a case which it could make against her if she did not become a confidential informant. (Tr. pp 248-259).

On appeal the Petitioner asserted the right to question the credibility of the State's witness through cross-examination as to whether law enforcement had a case which it could make against her (Tr. pp. 312-313), and argued that the trial court violated the Sixth and Fourteenth Amendment to the United States Constitution by foreclosing such cross-examination. (Appellant's Brief, pp. 7-10).

(The portions of the Transcript of Record cited herein are included in the Appendix to this Petition for Writ of Certiorari.)

ARGUMENT FOR ALLOWANCE OF WRIT

By affirming the Petitioner's conviction, the South Carolina Supreme Court necessarily found that the trial court did not err in foreclosing cross-examination of the witness' possible bias in favor of the State. This finding is in conflict with numerous decisions of this Court and of other federal and state courts, which have held that the right of confrontation provided by the Sixth Amendment is paramount.

The Sixth Amendment to the *United States Constitution* guarantees the accused the right to confront witnesses against him. As stated by the United States Supreme Court in *Pointer v. Texas*, 380 U.S. 400, 403-404 (1985):

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.

The right to cross-examine is crucial in "exposing falsehood and bringing out the truth in a criminal case." *Id.*

This right of confrontation includes the right to cross-examine adverse witness to establish motive, bias, and prejudice. *State v. Schmidt*, 288 S.C. 301, 303, 342 S.E. 2d 401 (1986). Bias, interest or motive may be established by cross-examining a State's witness as to "fear or favor" growing out of disposition of pending criminal charges. *Alford v. United States*, 282 U.S. 687, 693, 51 S.Ct. 218 (1931). Foreclosing cross-examination of such charges for the purpose of showing the witness' motive for testifying substantially erodes the accused's right of con-

the accused's right of confrontation. *People v. King*, 179 Colo. 94, 498 p.2d 1142 (1972).

The trial court may limit cross-examination of the facts underlying the charges pending against a witness, but may not totally exclude cross-examination of the fact that there are pending charges. *Com. v. Doherty*, 394 Mass. 341, 476 N.E.2d 169 (1985). In *United States ex rel Annunziato v. Manson*, 425 F. Supp. 1272 (D.Conn. 1977) aff'd 566 F.2d 410, the trial court had allowed the accused to cross-examine a key prosecution witness concerning prior drug use, but excluded cross-examination as to charges pending against the witness. The court held that the accused's Sixth Amendment rights had been violated, noting:

> [W]hile [the witness'] record of prior ... drug use may have borne on his general credibility, these bad acts did not show a continuing ulterior motive for testifying. ... If petitioner had been allowed to inquire with respect to [pending charges], he could have demonstrated [the witness'] present expectation of police and prosecutorial aid and protection in return for his testimony.
> ... This is not a case of a trial judge exercising his informed discretion in limiting cross-examination where the jury is already in possession of sufficient information concerning the witness' motives for testifying. [cite omitted] Here, the jury was left without any direct evidence as to what power the state could still assert over [the witness'] freedom.

425 F.Supp. at 1276-77.

There is no basis for denying this right where the witness happens to have been a confidential informant whose identity has been fortuitously determined. The cases which hold that the right of confrontation does not require the disclo-

sure of the identity of confidential informants do so on the basis that the informant is not a witness. *McAllister v. Brown*, 555 F.2d 1277 (5th Cir. 1977). Here, however, the informant was also a witness, so Ross' right of confrontation was both applicable and paramount.

The trial court did allow Ross to cross-examine Taylor as to her possible motives to testify against him personally; however, the court totally foreclosed cross-examination as to Taylor's "fear or favor" from any charges pending against her. The jury was not allowed to hear any direct evidence of the power the state could still assert over her freedom. Ross had an absolute right to cross-examine her on this subject, and the trial court clearly erred by foreclosing cross-examination on this subject.

The State has argued that any error committed by the trial court was harmless, arguing that Taylor's testimony was unimportant to the State's case. This position is untenable. There was no dispute that drugs were present in the Petitioner's truck at the time of his arrest. The only issue was how the drugs got there. The case ultimately revolved around whether Ross was telling the truth when he claimed that Taylor planted the drugs, or whether Taylor was telling the truth when she testified that the drugs were Ross'.

Under these facts, Ross had the right to cross-examinate her fully, not only as to her motives or bias against him personally, but also as to her "motive for favoring the prosecution" through the State's forbearance in prosecuting charges against her. *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 1435 (1986). The lower court's violation of Ross' right to cross-examine Taylor was not harmless error beyond a reasonable doubt, and his convictions must, therefore, be reversed.

For these reasons, the Petitioner requests that his Court grant this Petition and grant him a new trial.

BRYAN, BAHNMULLER, KING
GOLDMAN & McELVEEN

BY: _____

John P. Ford
P.O. Box 2038
17 East Calhoun St.
Sumter, SC 29151
(803) 775-1263
ATTORNEYS FOR PETITIONER

Sumter, South Carolina
March_____ , 1989

APPENDIX

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent

v.

James W. Ross, Jr., Appellant.

Appeal from Sumter County
David F. McInnis, Judge

Memorandum Opinion No. 89-MO-049
Submitted July 8, 1988 - Filed February 7, 1989

AFFIRMED

John P. Ford, of Bryan, Bahnmuller, King, Goldman & McElveen, of Sumter, for appellant.

Attorney General T. Travis Medlock, Assistant Attorneys General Harold M. Coombs, Jr., and Norman Mark Rapoport, all of Columbia; and Solicitor Wade S. Kolb, Jr., of Sumter for respondent.

PER CURIAM: Affirmed pursuant to Supreme Court Rule 23 and the following authorities: *State v. Martinez*, 294 S.C. 72, 362 S.E.2d 641 (1987); *State v. Lewis*, 293 S.C. 107; 359 S.E.2d 66 (1987); *State v. Sosebee*, 284 S.C. 411, 326 S.E.2d 654 (1985); *State v. Lee*, 269 S.C. 421, 237 S.E.2d 768 (1977); *State v. Tyner*, 273 S.C. 646, 258 S.E.2d 559 (1979).

s/ George T. Gregory, Jr. C.J.

s/ David W. Harwell A.J.

s/ A. Lee Chandler, Jr. A.J.

s/ Ernest A. Finney, Jr. A.J.

s/ Jean H. Toal A.J.

(Tr. pp. 248-249)

By Mr. Ford:

Q: What prompted you, Ms. Taylor, to become an informant?

Mr. Kolb: Your honor, we also object to that.

The Courts: Yes, sir. Sustained.

By Mr. Ford:

Q: Did Mr. Sims have a case that he could make against you if you didn't become an informant?

Mr. Kolb: That's the same question. Object.

The Court: Sustained.

Mr. Ford: I think it goes to her credibility and believability.

The Court: Sustained.

By Mr. Ford:

Q: Did you ever receive payment for any information you gave Mr. Sims?

A. No, sir, I have not.

Q: You do it just out of the goodness of your heart, or do you have some other reason for doing it?

A: I guess I did it out of the goodness of my heart.

Q. Became a concerned citizen?

A: Yes, sir, I did.

Mr. Kolb: Your honor, this gets back to the same thing you've sustained. Her motivation is not relevant. We object.

The Court: Well, as it relates to this particular case, he can ask her what her motivation was. If it was the goodness of heart, that's one thing; but anything -- let's face it. Don't know how many cases are pending in this courthouse that she's the informant on them, and I'm not going to let questions of that nature jeopardize her position. You can ask about this case.

(Tr. pp. 312-313)

4. The lower court erred in refusisng to allow counsel for Appellant [Petitioner] to cross-examine the confidential informant, Tammy Taylor, as to whether law enforcement had a case which it could make against her, the error being that such evidence is directly relevant to the credibility of her testimony.